THE MORMON QUESTION.

A dangerous Constitutional precedent may be confirmed by the exclusion from the Senate of the United States of the Mormon Senator from Utah, Mr. Smoot, because he acknowledges more than one wife. For the same cause a Representative in Congress, also a Mormon from Utah, was excluded from the lower House (vol. ii, No. 88, p. 5, No. 89, p. 6, No. 95, p. 4, and No. 96, p. 2), four years ago. In the Smoot case the Senate appears now to be on the point of following that precedent.

The direct effects of this action are not likely to be serious. Whether one man or another is admitted to a seat in Congress is of little moment in itself except to the man and his friends, and it cannot very long or deeply concern even them. But in the precedents thereby established, extremely dangerous tendencies may possibly lurk. For there is a strong disposition in public life to swing away from the written Constitution, and, avoiding the bother of meeting new conditions with appropriate amendments Constitutionally adopted, to meet them with a loose construction of the Constitutional text, thereby building up a body of precedents which make an unwritten constitution, under the superincumbent layers of which the written Constitution, with all its safeguards, may in time be entirely lost to sight. We are assured, in the symbolism which has become so common with the cultivators of our unwritten constitution, that the unwritten is to the written as flesh to skeleton. Let us be all the more careful, then, concerning any precedent we are about to make. We must not allow the flesh to accumulate in wrong places, nor the wrong kind of flesh to accumulate at all.

One of the baffling difficulties in the way of meeting the Mormon question on Constitutional grounds, and preventing another accumulation of dangerous precedents, is the really dangerous character of the Mormon organization. In the face of two dangers, the lesser one, if concrete and immediate, is apt to seem more dangerous than the greater, if that is abstract and remote. And the Mormon church is truly a concrete and immediate menace to popular government. Not only has it in the past openly and does it in the present covertly justify polygamy, but it makes a religious institution the absolute master of its members in their civic relations. Not satisfied with ruling them in religion, it rules them also in politics. It is a theocracy, with all of evil to the character of the individual and of danger to the liberties of the body politic that the theocratic idea of government involves.

But a greater menace to free society than the Mormon church may easily arise out of unwise precedents intended to suppress the evils or check the power of that institution. Let us, therefore, freely scrutinize the precedent and fearlessly condemn it if it is dangerous, even though we may seem to the thoughtless and the foolhardy to be defending the evil at which it is aimed.

I.

By what right, under our written Constitution, does either House of Congress exclude a Mormon member?

This is the first question to be considered. For if Congress excludes Mormons without Constitutional right, who can say when it will not utilize that precedent to exclude Catholics, Episcopalians, Methodists, Presbyterians, Christian Scientists, Socialists, Populists, Democrats, or—with a change of party sentiment—even Republicans?

There is no limit to the policy of might, save opposing might. If one majority may construe the Constitution in one crooked way, to please its friends, another majority may construe it in another crooked way, to punish its enemies; and so there will come to be no living Constitution, but only chaotic anarchy with the dead Constitution for a plaything.

The Constitutional right upon which this power to exclude is placed by its advocates is phrased in the fifth section of the first article of the Constitution as follows:

> Each House shall be the judge of the elections, returns and qualification of its own members,—

and may—

> punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

There is evidently no authority here either for adjudging a polygamous Mormon ineligible or for expelling him.

As to expulsion, manifestly that right must rest upon some act of disorderly conduct by the member while a member and as a member.

The Constitution does not give to two-thirds of Congress the right to expel arbitrarily. That would in effect be power to deprive a constituency of representation; and if any one thing about the Constitution is more clear than another, it is that Congress has no Constitutional power to deny representation to constituencies.

The obvious purpose of the expulsion clause is to enable each body to preserve order within its own walls. It is simply a limited police power.

What could be more absurd than to suppose that a representative body, forced by the Constitution to admit to membership all persons possessing certain specified qualifications, might thereupon expel such a member for lack of some qualification not so specified?

Clearly, if Mormons may be denied seats in Congress at all, for upholding or practicing polygamy, it cannot be by expulsion; it must be by exclusion for lack of the Constitutional qualifications.

And what are the Constitutional qualifications?

They are specified in the second, third and sixth sections of the first article. A Representative must be chosen every second year (at times and places and in a manner which Congress may regulate), by voters of his State who are qualified to vote for the most numerous branch of the State legislature; he must be 25 years of age; he must have been a citizen of the United States for seven years; and he must, when elected, be an inhabitant of the State in which he is elected. A Senator must be chosen by the legislature of his State (at times and in a manner which Congress may regulate); he must be 35 years of age; he must have been a citizen of the United States nine years;

and he must, when elected, be an inhabitant of the State for which he is chosen. Neither Representatives nor Senators may hold any other Federal office.

Now it is on those qualifications, and on those alone, that either House has Constitutional authority to pass judgment. If the applicant for membership has been duly elected, if he is of the prescribed age, if his citizenship has been of the prescribed duration, if he was when elected an inhabitant of the State whose credentials he presents, and if he holds no other Federal office, he must be admitted—not may be, but must be. Congress has no more Constitutional right to exclude such an applicant than judges would have if the power to "judge of the elections, returns, and qualification" of members of Congress were lodged in the courts. The power is judicial, not arbitrary.

II.

As well might Congress assume to impose a property qualification or a religious test, as to require that members shall not be polygamous Mormons. Indeed, this requirement is a religious test.

It is not against polygamy itself, nor against concubinage in any form, that the precedent under consideration is being made. Mr. Smoot would meet with no obstacle at the doors of the Senate if he were a bigamist from New York, unless he had been convicted therefor as a felon and not restored to citizenship; and then the obstacle would be the same that any other disfranchised felon would encounter. It would have no special reference to polygamy as being in itself a disqualification. Or, if Mr. Smoot had maintained a harem in New York, not as a religious rite but in open defiance of all decent sentiment, he would encounter no obstacle at all at the Senate doors. Neither concubinage in itself, nor bigamous marriage in itself, is the object of attack in the Smoot case. It is bigamous marriage as a rite of the Mormon church. The question is essentially a religious question, the test a religious test.

That this is so is only weakly and perfunctorily disputed. It is met less frequently with denial than with a line of argument resting upon the terms upon which Congress admitted the Territory of Utah to Statehood. Those terms are construed to mean that Utah must perpetually prevent Mormon polygamy; and it is argued that Congress may enforce the terms by refusing to admit Mormon polygamists to membership, even though they are duly elected and possess all the Constitutional qualifications. The argument is convenient for the occasion, but it is heavily charged with every sort of political explosive.

What Constitutional authority had Congress to impose upon a new State an irrevocable non-Constitutional condition of Statehood? None at all. The Constitution itself prescribes the only Constitutional limitations that can rest upon the sovereignty of any American State.

True, Congress might impose any condition for admission to Statehood, not expressly un-Constitutional; for admissions to Statehood are discretionary with Congress. In this case, however, the condition was expressly un-Constitutional. A condition that Mormon polygamy shall be prohibited is tantamount to setting up a religious test; and the Constitution expressly forbids the making by Congress of any "law respecting an establishment of religion or prohibiting the free exercise thereof."

But if we disregard the religious nature of the condition imposed upon Utah, and consider it merely as a requirement that the new State should make bigamy a crime, regardless of religious sanction, the condition has no Constitutional vitality. While it could have operated to deny to the Territory the benefits of Statehood at the pleasure of Congress, this would have been an operation not of Constitutional right, but of non-Constitutional might. The potency of the non-Constitutional condition precedent imposed upon the subordinate Territory of Utah could not survive the Constitutional creation of the sovereign State of Utah.

When Utah became a State it acquired all the rights of sovereignty that the original States enjoy. And one of those rights is the right (12th Amendment) to all "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States." Powers delegated to the United States or prohibited to a State otherwise than by the Constitution, "are reserved to the States respectively." Consequently the State of Utah may legalize polygamy, whether as a religious rite or not, and may send polygamous Representatives and Senators to Congress, notwithstanding any bargain the defunct Territory of Utah may have made with Congress in the name and behalf of the then non-existent State. Even if made by the State itself, otherwise than through an amendment to the Federal Constitution, such a bargain would be impotent.

The question of Mormon polygamy in Utah is as clearly a domestic question, subject to regulation by the State itself, as was the question of slavery in Mississippi half a century ago.

III.

But must the people of the United States suffer the disgrace of protecting a polygamous institution, and incur the danger of having their liberties fall under the blight of a theocratic church, because that church happens to have gained control of one of the States? Such is the question, in one form or another, that recurs whenever the legal argument for Mr. Smoot's exclusion fails.

There are some people who throw considerations of law and order to the winds, if law and order stand in their way; and they are no more numerous in the labor movement than in churches, clubs and Congress. It is these chaotic anarchists who ask the kind of questions we have summarized at the beginning of this paragraph.

Let us consider the questions.

The real issue is not whether Mormon polygamy shall be stamped out, but how? Shall it be done lawfully or lawlessly?

In order to grasp that issue at the roots, let us suppose a similar though worse problem, without the minor complications of this one. We will suppose that the objectionable institution exists not in a new State, with which Congress has made a Statehood bar-

gain, but in one of the original States. We will suppose that in New Jersey, let us say, a theocratic sect has become very powerful politically, and that one of its rites is blood sacrifice—the murder of children, for instance, under ecclesiastical sanction and local legal permission. Such things have flourished (though not in New Jersey), just as eccleciastical polygamy has; and as polygamy has revived, so might these child sacrifices.

What should Congress do in such a case? What could it do?

To assent to toleration of the horror nationally would be unthinkable. We could not content ourselves with repeating that we are not a nation responsible for the morality of our States, but a federation responsible only for certain specified kinds of public management, and that these horrors do not fall within our Federal jurisdiction. In spite of all such protests, the civilized world would think and we should feel that the blood of these little victims of superstition was on our hands.

We could not regard the matter as strictly local. We could not but shudder at the thought of admitting participants in these ecclesiastical orgies into our national Congress. We should insist, and be right in insisting, that the practice be brought under national control.

But how?

Surely not by invading a sovereign State arbitrarily. Nothing but harm, incalculable harm, could come in the end, from a precedent, even with so great provocation, under which Congress could usurp the reserved domestic rights of any State.

Surely not by excluding from Congress Representatives and Senators from New Jersey, who were possessed of all the Constitutional qualifications, on the ground that they lacked the non-Constitutional qualification of abstention from the practice of ecclesiastical blood-sacrifices.

Neither by expelling those Congressmen for disorderly conduct as members, because of their participation, sanctioned by their church and unrebuked by the State they represented, in this awful yet non-Federal crime.

If the people of the United States were really opposed to blood-sacrifice, there is a way in which they could stamp it out more speedily than by any such acts of lawlessness on the part of Congress—a way which would possess the advantage of being lawful and orderly.

It is for such emergencies, among others, that the Federal Constitution provides for its own amendment. It was by taking advantage of this that we finally stamped out chattel slavery, another barbarian survival, with the iniquities of which, moral and political, the nation suffered long. So we could stamp out the horrible ecclesiastical practice we have imagined to have become prevalent and legal in one of our States.

Some difficulties would, indeed, be encountered in this course. Both Houses, by a two-thirds vote, would have to propose the amendment; or, on the application of two-thirds of the States, would have to call a convention for proposing and considering it; and the amendment would have to be ratified by three-fourths of the States. But these things could be quickly done if the emergency were great enough to have aroused the national conscience.

In that illustration is the answer to those who would attack Mormon polygamy by dangerously trifling with the Constitution instead of regularly amending it.

If there is not enough national sentiment against Mormon polygamy to carry through an amendment to the Federal Constitution, there is certainly not enough to justify the creation of precedents under which a bare majority in Congress may at any time find authority for overriding the Constitutional rights of weak minorities.

The only safe disposition of the Mormon question is through the amendment clause to the Constitution.

To expel Utah from the Union is out of the question. It would be revolutionary even if it were possible.

To exclude Representatives and Senators for any cause not applicable to Congressmen from every other State, is also revolutionary; and to exclude them for causes not specified in the Constitution is to create a category of unwritten qualifications the ultimate magnitude and despotic effect of which no man could foretell.

To expel them after their admission, for causes not in the nature of disorder prejudicial to legislative procedure and which do not Constitutionally disqualify is to open up new avenues for shutting off popular representation in Congress.

Yet the evil, if the people of the United States so regard it—and if they do not it is not a proper subject for Congressional interference—can be speedily, safely, effectively and lawfully suppressed. Nothing is necessary but the adoption of a Constitutional amendment subjecting marriage and divorce to national regulation, along with the other matters of personal and local concern, such as bankruptcy, which have already been committed to national control.

Whether such an amendment ought to be adopted or not is beside the question. The point is that this is the only lawful manner of accomplishing the object sought to be accomplished by the dangerously arbitrary expedient of excluding Mormon Representatives and Senators from Congress.

EDITORIAL CORRESPONDENCE.

Washington, D. C., March 5.—Owing to press of other matters and because of sickness I did not keep track of the "Rosebud Reservation Bill" after its passage in the House on February 1st, and until this week I was under the impression that it had also passed the Senate and gone to the President. I was therefore gratified to learn from the Monday evening Washington papers that the President had expressed opposition to the bill in the form in which it passed the House and was said to favor putting the lands up at public auction.

While this was not a change of great moment, yet it was satisfactory to know that the President was considering any plan other than the present one. I therefore on Tuesday called upon him to urge that the leasing system be substituted for the old plan of outright sale at an up-set price.

When the subject was first broached, he was quite vigorous in asserting that he would not consider the leasing of farming land. I requested an opportunity to say something in favor of the leasing system before he determined his